LIM AH HUN

v.

SOON YEE LING & ANOR

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
PAJAN SINGH GILL JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: P-02-63-2001]
20 JANUARY 2009

CONTRACT: *Sale and purchase of land - Charged land - Purchaser failed to redeem land from chargee within agreed date - Vendor terminated agreement and forfeited deposit before completion date for payment of balance purchase price - Whether vendor entitled to do so*

The appellant agreed to purchase the respondents' lands at a price of RM1,600,992 pursuant to a sale and purchase agreement ('SPA') executed by both parties to that effect. The appellant paid a deposit of RM264,992. It was agreed that the balance of RM1,336,000 was to be paid within one year from the date of the SPA unless the respondents failed to deliver vacant possession on the completion date following which the appellant could extend it for a further three months and thereafter for another three months from the extended date. The lands were charged to the bank and the appellant was to redeem the lands within 60 days from the date of the SPA with an extension of one month. The appellant's application for a bank loan was approved on 26 June 2000. The appellant, however, failed to redeem the property within the stipulated 60-day period. The respondents gave notice to terminate the SPA and forfeit the deposit on the grounds that the appellant failed to comply with cl. 2 of the Fourth Schedule of the SPA. The appellant then commenced an action for declarations in the High Court that the termination of the SPA was null and void and the forfeiture of the deposit unlawful. The learned judge found in favour of the respondents on the ground that the appellant failed to pay the redemption sum as stipulated in the SPA. The appellant now appealed. The main issue was whether the respondents were entitled to terminate the SPA and forfeit the deposit sum due to the appellant's failure to redeem the lands before the SPA's completion date for payment of the balance purchase price.

Held (allowing the appeal):
Per Hashim Yusoff JCA delivering the judgment of the court:

(1) Clause 2 of the SPA's Fourth Schedule only stipulated the appellant's obligation to pay the full redemption sum. No reference was made on the consequences of any default in the payment of such redemption monies. Such reference was only made in cl. 8 and that too in relation to the balance purchase price under cl. 2. It did not refer to the non-payment in full of the redemption monies. (para 13)

(2) The appellant's failure to comply with cl. 2 of the SPA's Fourth Schedule did not entitle the respondents to terminate the SPA and forfeit the deposit sum as there was no specific provision to enable them to do so. (para 14)

(3) The case of *Dial Kaur Tara Singh v. Mann Foong Realty Sdn Bhd* was distinguished. In that case, the plaintiff failed to pay the sum demanded by the bank for the release of 8 titles to enable the defendant to execute the transfer thereof to the plaintiff. That proved fatal to the case. In the instant appeal, whilst there was a provision in the event of a default in the payment of the balance purchase price, no such provision was made in the event of default in payment of the redemption monies. It was not for the court to rewrite the SPA to provide for the omission. (para 14)

Bahasa Malaysia *Translation Of Headnotes*

Perayu bersetuju untuk membeli tanah responden-responden pada harga RM1,600,992 di bawah satu perjanjian jual beli ('SPA') yang dimeterai oleh kedua-dua pihak. Perayu bersetuju untuk membayar deposit sebanyak RM264,992. Juga dipersetujui bahawa baki sebanyak RM1,336,000 akan dibayar dalam tempoh setahun dari tarikh SPA kecuali responden-responden gagal menyerahkan milikan kosong pada tarikh penyempurnaan, ekoran mana perayu boleh melanjutkannya selama tiga bulan dan selepas itu selama tiga bulan lagi dari tarikh yang dilanjutkan tersebut. Tanah-tanah telah digadai kepada bank dan perayu dikehendaki menebus tanah-tanah dalam tempoh 60 hari dari tarikh SPA dengan lanjutan masa selama sebulan. Permohonan pinjaman bank perayu telah diluluskan pada 26 Jun 2000. Perayu, bagaimanapun, gagal menebus balik tanah-tanah dalam tempoh 60 hari yang ditetapkan. Responden-responden memberi notis untuk menamatkan SPA dan merampas deposit atas alasan bahawa perayu telah gagal mematuhi

Jadual Keempat kl. 2 SPA. Berikutnya, perayu memulakan tindakan di Mahkamah Tinggi bagi mendapatkan relif deklaratori bahawa penamatan SPA adalah tak sah dan batal dan bahawa perampasan deposit juga adalah tak sah. Yang arif hakim mendapati bagi pihak responden-responden atas alasan perayu telah gagal membayar wang tebusan sepertimana yang ditetapkan oleh SPA. Perayu kini merayu. Isu utamanya adalah sama ada responden-responden berhak untuk menamatkan SPA dan merampas wang deposit ekoran kegagalan perayu menebus tanah-tanah sebelum tarikh SPA disempurnakan dengan membayar baki harga belian.

Diputuskan (membenarkan rayuan):
Oleh Hashim Yusoff HMR menyampaikan penghakiman mahkamah:

(1) Klausa 2 Jadual Keempat SPA hanya menetapkan obligasi perayu untuk membayar jumlah penuh penebusan. Tiada rujukan dibuat berhubung akibat dari sebarang kemungkiran dalam pembayaran wang tebusan sedemikian. Rujukan berkenaannya hanya dibuat dalam kl. 8 dan itu pun berkaitan dengan baki harga belian di bawah kl. 2. Ia tidak merujuk kepada kegagalan membayar sepenuhnya wang tebusan.

(2) Kegagalan perayu mematuhi kl. 2 Jadual Keempat SPA tidak memberi hak kepada responden-responden untuk menamatkan SPA dan merampas wang deposit kerana tidak terdapat peruntukan khusus yang membolehkan mereka berbuat demikian.

(3) Kes *Dial Kaur Tara Singh v. Mann Foong Realty Sdn Bhd* dibezakan. Dalam kes tersebut, plaintif gagal membayar jumlah yang dituntut oleh bank bagi melepaskan 8 geran hakmilik bagi membolehkan defendan memeterai pindahmilik kepada plaintif. Itu terbukti fatal kepada kes. Dalam kes semasa, sementara memang terdapat peruntukan jika berlaku kemungkiran membayar baki harga belian, tiada peruntukan seperti itu dibuat jika berlaku kemungkiran membayar wang tebusan. Bukanlah tugas mahkamah untuk menulis semula SPA bagi membetulkan peninggal tersebut.

Cases referred to:

Dial Kaur Tara Singh v. Mann Foong Realty Sdn Bhd [2000] 4 CLJ 93 CA ***(dist)***

Wisma Sime Darby Sdn Bhd v. Wilson Parking (M) Sdn Bhd [1996] 4 CLJ 194 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 30

For the appellant - K Balasundram (Jason Ong with him); M/s Cheah, Kah Peng & Ong

For the 1st & 2nd respondents - S Rajendran; M/s Mohd Imtiaz, Choong & Partners

[Appeal from High Court, Pulau Pinang; Originating Summons No: 24-1523-2000 (MT-1)]

[Editor's note: This decision was reversed on appeal to the Federal Court. For the Federal Court judgment published in the same journal, please see Soon Yee Ling & Anor v. Lim Ah Hun [2010] 2 CLJ 785.]

Reported by Usha Thiagarajah

JUDGMENT

Hashim Yusoff JCA:

[1] We unanimously allowed this appeal. I now give our reasons.

Background Facts

[2] The appellant/plaintiff had entered into a sale and purchase agreement with the respondents/defendants dated 11 April 2000 ("the SPA") whereby he had agreed to purchase and the respondents/defendants agreed to sell some pieces of land in Georgetown, Penang ("the said property") at a price of RM1,600,992. The appellant had received a deposit of RM264,992 on execution of the SPA and the balance of RM1,336,000 was to be paid within one year from the date of the SPA with the proviso that if the respondents could not deliver vacant possession of the said property on the Completion Date, then the appellant shall extend the Completion Date for a further period of three months without interest, and thereafter if the respondents still could not hand over vacant possession on the extended Completion Date, then the appellant shall extend the extended Completion Date for a further period of three months.

[3] The said property was sold subject to a Tenancy Agreement dated 1 March 1998 ("the said Tenancy Agreement") whereby the appellant was entitled to collect rental at RM6,500 per month from the date of the SPA. The said property had been charged to the bank and the appellant was to redeem the said property within 60 days from the date of the SPA with an extension of one month. The appellant had applied for a bank loan of RM800,000 which was approved on 26 June 2000.

[4] On 21 July 2000 the respondents terminated the SPA when the appellant failed to comply with s. 4 of the Fourth Schedule of the SPA which reads:

> The Purchaser shall pay the full redemption monies for the said Property owing by the Vendor to Standard Chartered Bank Malaysia Berhad and Asia Commercial Finance (M) Berhad within sixty (60) days from the date hereof with an extension of one (1) month.

At The High Court, Penang

[5] The appellant then sought a declaration in the High Court that the termination of the SPA was null and void and that it was still subsisting and that the forfeiture of the deposit sum of RM160,099.20 by the respondent was also unlawful. The learned High Court Judge held that since the appellant failed to redeem the said property within the 60 days as stipulated in the SPA, therefore the respondents were entitled to terminate the said SPA and forfeit the deposited sum. Dissatisfied, the appellant is now appealing against the decision of the High Court.

The Appeal

[6] Learned counsel for the appellant, submitted that there is only one central issue ie, whether the respondents were entitled to forfeit the deposit of RM160,099.20 because of the appellant's failure to redeem the said property from the chargees even before the Completion Date of the SPA for the payment of the balance of the purchase price. He then referred to para. 6 of the First Schedule of the SPA which states that the amount of deposit payable on the execution of the SPA was RM264,992. But under s. 11 of the same Schedule, the amount of forfeitable deposit was only RM160,099.20 para. 9 of the First Schedule stipulates the time and manner of the payment of the balance of the purchase price.

[7] Learned counsel for the appellant submitted that nowhere is it stated in the SPA, regarding the consequence of the appellant's failure to pay the redemption sum within the three months as required under para 2 of the Fourth Schedule to the SPA. Under cl. 8 of the SPA one of the consequences of default by the Appellant to pay the balance of the purchase price or any payment thereof pursuant to cl. 2 of the SPA is the forfeiture of the RM160,992.20. But there is no provision to forfeit the deposit by reason of the failure to comply with the requirement for payment of the redemption monies within the time stated (3 months) under para 2 of the Fourth Schedule.

[8] Reference was made to the case of *Wisma Sime Darby Sdn. Bhd. v. Wilson Parking (M) Sdn. Bhd.* [1996] 4 CLJ 194 where the Court of Appeal *inter alia* held:

> (1) An option clause is void for uncertainty unless the agreement provided the machinery or some formula which the courts can utilize to ascertain what is otherwise unascertainable without the parties coming to an agreement. The courts will not lend their aid to the enforcement of an incomplete agreement. In the instance case, the rental for the renewed period of the tenancy had to be agreed by the parties. The agreement for renewal as executory and there was no machinery or formula for the court to ascertain the rent if the parties could not come to an agreement on the rent. On authority and on principle, the alleged agreement was bad for uncertainty. Thus, the option clause for a further term at 'a rent to be agreed' was void for uncertainty and there was no need for a trial to come to that conclusion.

[9] Learned counsel for the appellant further submitted that since there is no provision regarding the failure to comply with para 2 of the Fourth Schedule, therefore the SPA is void for uncertainty by virtue of s. 30 of the Contracts Act 1950.

[10] In reply, learned counsel for the respondents submitted that s. 30 of the Contracts Act 1950 was not pleaded nor canvassed in the High Court and it should not be argued before us. He then relied on the case of *Dial Kaur Tara Singh v. Mann Foong Realty Sdn. Bhd.* [2000] 4 CLJ 93 where, the brief facts are as follows:

The plaintiff instituted proceedings against the defendant for specific performance of an agreement contained in a letter, in particular para (c) thereof, which was for the defendant to execute the transfer of eight titles named in the paragraph to the plaintiff. Paragraph (d) of the agreement stated that the plaintiff had to pay Malayan Banking Bhd RM1,186,640 in order to obtain the release of the said eight titles and the defendant's 23 titles from the bank. The plaintiff had failed to pay the sum demanded by the bank and it managed to get from the bank only the 23 titles which belonged to the defendant and which it kept.

[11] The Court of Appeal in that case, in allowing the defendant's appeal to dismiss the plaintiff's action held, *inter alia*:

(1) The obligation of the defendant under para (c) was merely a subsidiary term, the non-performance of which did not relieve the plaintiff from his primary obligation under para (d). The obligation of the plaintiff under para (d) was a fundamental term. Therefore the promise of the defendant to execute the eight transfers in para (c) could not be claimed by the plaintiff till the plaintiff's own promise in para (d) had been performed. The non-performance of the plaintiff's promise to pay the bank in full and to recover all the 31 titles from the bank was fatal to its case. If the plaintiff failed to perform its promise in para (d), it could not claim the performance of the reciprocal promise by the defendant in para (c) by virtue of s. 55 of the Contracts Act 1950. If the plaintiff was not entitled to make such a claim against the defendant till its own obligation in para (d) had been performed, then its action against the defendant must surely fail.

Court's Finding

[12] The respondents through their solicitors' letter dated 21 July 2000 addressed to the appellants solicitors informed them that the appellant/plaintiff had committed a breach of the said SPA by failing to make the payments pursuant to para 2 of the Fourth Schedule of the SPA within the time stipulated. In the circumstances the Respondents thereby terminated the said SPA and forfeited absolutely the sum of RM160,099.20 as set out in s. 11 of the said SPA from the sum of RM264,992 deposited pursuant to s. 6 of the First Schedule of the said SPA as agreed liquidated damages.

[13] It is to be noted that, as submitted by learned counsel for the appellant, para 2 of the Fourth Schedule only stipulates the appellant's obligation to pay the full redemption sum. There is no mention of the consequences of any default in the payment of such redemption monies. Only cl. 8 of the SPA which refer to a failure to pay the balance of the purchase price under cl. 2 of the SPA provides that the SPA shall become null and void. It does not refer to the non payment in full of the redemption monies.

[14] With respect to the learned High Court Judge, I cannot agree that the appellant's failure to comply with para 2 of the Fourth Schedule would entitle the Respondents to terminate the SPA and forfeit the deposit as there is no specific provision to enable them to do so. The case of *Dial Kaur (supra)* is distinguishable because in that case it was held that the failure of the plaintiff to pay the sum demanded by the bank in order to obtain the release of the 8 titles kept by the bank to enable the defendant to execute the transfer of the said 8 titles to the plaintiff, was fatal to the case. In this instant appeal, while there is provision in the event of a default in the payment of the balance of the purchase price, no such provision is made in the event of default in payment of the redemption monies. It is not for the court to rewrite the SPA to provide for the omission.

[15] For the above reasons, we allowed the appeal with costs to the appellant. The order of the High Court is set aside. The deposit is also to be refunded to the appellant.